IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

NO. 9031

ROBERT DESHAY LEE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S OPENING BRIEF

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Seattle, Washington.

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STATEMENT OF JURISDICTION

Jurisdiction of the District Court

Appellant was indicted for violation of the Mann Act on two counts in the District Court of the United States for the Western District of Washington, North-

ern Division, on September 17, 1938. (Tr. p. 3) In Count I for conspiracy in obtaining transportation from the city of Portland in the state of Oregon to the city of Seattle in the state of Washington, and from the city of Seattle to the city of Portland, for immoral purposes, between the 4th day of July, 1936, and the 16th day of July, 1937. In Count II for obtaining transportation for a certain woman, to-wit: June Allen, on the 8th day of July, 1936, from the city of Portland in the state of Oregon to the city of Seattle in the state of Washington for immoral purposes. (Vio. Section 88, Title 18, U. S. C. A.) conspiracy to violate Section 398, Title 18, U. S. C. A., and vio. Section 398, Title 18, U. S. C. A.

On the 23rd day of September, 1938, the appellant entered a plea of not guilty (Tr. p. 9). The trial resulted in a verdict of guilty as to Count I and not guilty as to Count II.

The District Court had jurisdiction. (28 U. S. C. A. 41; Judicial Code, Section 24, Paragraph I.)

Jurisdiction of the Circuit Court of Appeals

The Circuit Court of Appeals has jurisdiction (28 U. S. C. A., Section 225; Judicial Code, Section 128).

STATEMENT OF THE CASE

Appellant was indicted and tried in the United States District Court for the Western District of

Washington, Northern Division, together with four other defendants, Vernon Paul Green, Jean Green, Sherman Johnson and James Barker. Marie Harris testified as a Government witness after a plea of guilty. Vernon Paul Green and Jean Green were convicted on both counts. Appellant was convicted on Count I and acquitted on Count II.

The conspiracy is alleged to have existed between on or about the 4th day of July 1936, and the 16th day of July, 1937 (Tr. p. 3). The Government depended almost solely upon the evidence of June Allen, alias June Woods.

Giving the Government the most favorable construction to her testimony, (that portion in italics is disputed by one or more witnesses), it appears that June Allen, alias June Woods, was transported from Portland in the state of Oregon to the city of Seattle in the state of Washington on July 8, 1936, in an automobile owned and operated by the defendant Vernon Paul Green, accompanied by Sherman Johnson, alias Ben Purvis (Tr. p. 28). At that time neither the appellant nor June Allen knew of the other. They met *at 919 Washington Street in Seattle, Washington at the home of Mrs. Green August* 4, 1936 (Tr. p. 32). *Thereafter from time to time for a period of about nine months the appellant and June Allen lived together in the Marr Hotel in Seattle, Washington, dur-*

ing which time June Allen gave to appellant her earnings as a prostitute (Tr. p. 33). On Christmas, 1936, June Allen gave to appellant a combination clock and lighter (Tr. p. 34). *Appellant took June Allen from Seattle to Vancouver, Washington, where she got out of the car and took a bus into the city of Portland, Oregon, later meeting appellant at the home of Myrtle Barno, 3236 North Vancouver Avenue, Portland, Oregon* (Tr. p. 34). June Allen told the prosecutor it was the latter part of September, 1936, but that she could not state the day or the month but it was in 1937; that the purpose of her trip was to see her mother and son, both of whom were ill, (Tr. p. 33) and she asked Mr. Lee to take her there because of that fact and that was the only reason she gave for the trip. (Tr. p. 45)

At the age of sixteen June Allen was away from home on an overnight trip in a stolen automobile with two boys and a girl companion. The boys were arrested and June Allen was a witness against them for the state and the boys were sent to the penitentiary. (Tr. p. 43). In addition June Allen testified against and was instrumental in convicting seven people on white slave charges (Tr. p. 43). She started the life of a prostitute in 1936. She has since that time lived with eight colored men. Her first patron as a prostitute was a colored man. The longest period of time in the five years that she lived with any one colored man was

seven months (Tr. p. 44). Of all the colored men with whom she lived, other than the appellant and the co-defendant James Barker, whose names she could remember, were James Obey, with whom she lived in Portland, Oregon and Aberdeen, Washington, and Arthur Richardson, with whom she lived in Portland about a month. (Tr. p. 46).

June Allen was a witness in the case in Federal Court involving a white slave charge against Jack Clark, in which case she admitted she committed perjury. (Tr. p. 42). In a white slave case being prosecuted in the United States District Court at Seattle, and before the trial judge herein, about a week prior to the trial of the instant case June Allen admitted she committed perjury. (Tr. p. 48).

The questions raised for review on this appeal are briefly as follows:

1. Insufficiency of the evidence.

2. The failure of the court to give to the jury a cautionary instruction regarding the testimony of the Government's principal witness, June Allen, after she had admitted committing perjury upon two former hearings in Federal court involving white slave traffic cases.

SPECIFICATIONS OF ERROR

Specification No. I.

(a) Assignment No. I. (Tr. p. 22)

(b) Assignment No. II. (Tr. p. 23)

(c) Assignment No. III. (Tr. p. 23)

Specification No. II.

(a) Assignment No. IV. (Tr. p. 23)

ASSIGNMENTS OF ERROR

Assignment of Error No. I.

The Court erred in overruling appellant's challenge to the sufficiency of the evidence and motion to direct a verdict in favor of appellant and against the Government of not guilty as to Count I in the indictment, for the reasons that there was no evidence by the Government remotely connecting appellant with the crime charged in Count I of the indictment.

Assignment of Error No. II.

The Court erred in denying appellant's challenge to the sufficiency of the evidence at the close of the entire case and in the refusal of the Court to direct a verdict of "not guilty as to Count I of the indictment" upon the ground and for the reason that there was no evidence, either upon the part of the Government or upon the part of the appellant, or at all, remotely connecting appellant with the crime charged in Count I of the indictment.

Assignment of Error No. III.

The Court erred in refusing appellant's requested

instruction that the jury return a verdict of not guilty as to appellant on Count I of the indictment.

Assignments of Error No. I., No. II., and No. III. raised the same points of law and will be discussed together.

ARGUMENT

Summary of Argument

Insufficiency of the evidence. (a) No evidence of agreement, understanding or concerted action with guilty knowledge between the appellant and any one or more of the defendants. (b) The object of the trip to Portland as contended for by the Government was not in violation of the statute.

Detailed Argument

(a) Reference to the evidence offered by the Government, and giving the Government the benefit of the most favorable interpretation thereof, fails to establish one of the essential elements of conspiracy. Neither the appellant nor June Allen knew the other until August 4, 1936, almost a month after June Allen was brought from Portland to Seattle. (Tr. p. 32). That they lived together and appellant received her earnings (Tr. p. 33) unsupported by a corrupt agreement or understanding between appellant and some other person, together with guilty knowledge on the

part of each, is not sufficient to prove conspiracy. *Morrison v. California,* 97 Law Ed. 664.

(b) June Allen testified on direct examination: "The object of the trip to Portland was I wanted to go to Portland to see my mother and son who were both ill." (Tr. p. 33). Again on cross-examination: "I wanted to go to see my mother and son and I asked Mr. Lee to take me because of that fact. This is the only reason I had to go and that is the only reason I gave him * * * I went to Portland for the sole purpose of seeing my mother and baby." (Tr. p. 45). In addition to this June Allen testified that she stayed overnight in Portland with appellant and that they had intercourse. It must be remembered, however, that all that testimony was positively and unequivocally denied by appellant.

Assuming that the testimony of June Allen is true, it does not prove the act denounced by the statute.

> "The mere fact that an immoral act was committed in an interstate journey does not of itself constitute that essential element of the offense. Its relevance in that respect is evidentual, not substantive, and when relied upon as evidence of a preconceived purpose care must be taken to regard it in its true perspective."
>
> *Biggerstaff v. U. S.,* 260 Fed. 926.
>
> "The transportation must be for an immoral purpose denounced by the act and hence transportation for this purpose or the mere commission of

> an immoral act with a woman while on an interstate trip for a lawful purpose where immorality was merely casual and not the purpose for which the trip was made, does not bring the transportation within it."
>
> *Corpus Juris,* Vol. 5, p. 820, Sec. 57.

See also: *Sloan v. U. S.,* 270 Fed. 91; *Van Pelt v. U. S.,* 240 Fed. 346 and *Fisher v. U. S.,* 266 Fed. 667.

The last cited case is particularly in point. The purpose of the visit which involved traveling interstate was for the purpose of visiting a relative. The appellant furnishing the transportation and during the trip engaged in an immoral act with the Government's witness. It was held that the immoral act was incidental, the purpose of the trip being a visit to the relative. The evidence of the Government therefore brings the instant case within the rule above quoted and not within the white slave act.

Assignment of Error No. IV.

The Court erred in refusing to give the jury a cautionary instruction with reference to the testimony of June Allen.

ARGUMENT

Summary of Argument

Perjury committed in the presence of the trial judge, admitted by the witness in open court, with the admission of further perjury in the trial of a similar case, requires the Court to either strike all the testimony of

such witness or in the alternative to give an extreme cautionary instruction to the jury on the court's own motion.

Detailed Argument

The witness June Allen, upon whom the Government almost solely depended, admitted upon cross-examination that she had committed perjury recently in two separate proceedings in the United States District Court in which a violation of the Mann Act was in issue, one of which was being tried by the trial judge in this case (Tr. pps. 42, 47 and 48). These admissions of perjury were made upon cross-examination. At the close of the cross-examination appellant moved the Court to strike the testimony of the witness upon the ground that she had admitted perjury, which motion was denied and exception was allowed. (Tr. p. 46).

The statute of the State of Washington, *Remington's Compiled Statutes of Washington,* Sec. 1212, Provides:

> "No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility; Provided, that any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon."

The following written instruction was requested by the appellant:

> "You are instructed that no person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility; Provided, that any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon. Sec. 1212 Rem. Compiled Statutes, 6 Wash. 563, 139 Wash. 636." (Tr. p. 112).

To preserve the purity of its procedure reason prompts the adoption of the rule that the Court on its own motion, under circumstances as presented in this record, especially where perjury is committed before the trial judge, should either exclude the testimony entirely or subject it to a most extreme cautionary instruction. In the trial of this case the Court failed to do this, in face of a timely motion to exclude and a timely request for a cautionary instruction. This was clearly error.

Speiller v. U. S., 31 Fed. (2nd) 682. In this recent case where the admission of perjury was less glaring because the admitted perjury was in another state and in a state court, the Circuit Court of Appeals reversed, in the face of the defendant's failure to make a timely

request of any kind, using the following expression at p. 683:

> "Under these circumstances, while the request of the defendant was not submitted in time, the jury should have been instructed, even without request, that her testimony should be subjected to careful scrutiny and considered with great caution."

This rule has not been modified, so far as counsel is able to ascertain, in the slightest degree. It is a wholesome rule and in the furtherance of the inherent power of the Court to preserve the highest standard of integrity of oral testimony, the above quoted rule should be sustained.

Appellant submits that the case should be reversed, with instructions to dismiss the action or in the alternative ordering a new trial for the appellant.

Respectfully submitted,

GEO. H. CRANDELL,

Attorney for Appellant.